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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 507

SOLOMON P. ROSENBLOOM, Also Known as
SOL ROSENBLOOM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Eighth Circuit.**

SOLOMON P. ROSENBLOOM,
Also Known as SOL ROSENBLOOM.

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Of Counsel.

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St. Louis 2, Missouri.

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# SUPREME COURT OF THE UNITED STATES.

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SOLOMON P. ROSENBLOOM, Also Known as
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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

Petitioner Solomon P. Rosenbloom, also known as Sol Rosenbloom, prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming a judgment and sentence of imprisonment for violation of the Internal Revenue Act.

## JURISDICTION.

Petitioner was tried and convicted of an indictment charging him with violation of the Internal Revenue Act, in the United States District Court for the Eastern District of Missouri. On October 15, 1958, the Court of Appeals filed its opinion and judgment affirming the judgment of the District Court. Jurisdiction of this Court to review the opinion and judgment of the Court below by writ of certiorari is invoked under 28 U. S. C. A., Sec. 1254 (1).

## QUESTIONS PRESENTED.

I.

Does failure to file a motion for acquittal at the close of all the testimony prevent review of the question of sufficiency of the evidence to support a conviction?

II.

~~It is~~ prejudicial error, in the trial of a defendant charged with a criminal offense in which specific intent is an essential element, to instruct the jury that—

> "The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income?"

III.

If the only issue in the case is whether the defendant acted with an honest or an evil motive, is the error in giving the foregoing instruction so serious as to warrant its review under Rule 52 (b) of the Federal Rules of Criminal Procedure, even though timely objection to the instruction was not made?

## RULES INVOLVED.

Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A.:

> "**Instructions.** At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.:

> "**Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

## STATEMENT.

Petitioner was indicted, tried and convicted by a jury on each of six counts charging him with violation of the Internal Revenue Act. On this conviction he was sentenced to imprisonment for eighteen months on each count, the sentences to run concurrently, and fined $2,500.00.

Two of the counts charged the petitioner with having under-reported the joint income of himself and his wife for the years 1950 and 1951, the total tax deficiency being a little over $900.00 for 1950 and a little over $1,000.00 for 1951. Two of the counts charged him with preparation of the joint income tax returns for his brother and his brother's wife for the same two years, the tax deficiency being approximately the same as in the case of the returns for petitioner and his wife. The remaining two counts charged petitioner with filing partnership information returns, for the same two years, for the Rosenbloom Monument Company, in which the net income reported for the company was under-reported in each year. Because the partners in the company were five persons, to wit, the petitioner, his two sons and the petitioner's brother and his son, one-fifth of the under-reported amount of the partnership's net income was reflected in each of the individual income returns of the petitioner and his wife and of the petitioner's brother and his wife, resulting in the aforesaid tax deficiency on the individual return of approximately $1,000.00 for each year.

At the trial petitioner did not deny the under-reporting of the net income of the partnership and the resultant under-reporting on the individual returns. His explanation was that in reporting the net income for the partnership, he excluded a sum of $21,000.00 in 1950 and a sum of $22,000.00

in 1951, which he felt represented a fair "fee" to the five partners "for running the business." This fee, he testified, he "thought we had coming to us—that we didn't have to pay taxes on" (R. pp. 45-47).

**The claim of honest though mistaken belief as to the tax law was therefore the only defense, and raised the only issue, which the jury was called upon to decide.** Supporting this claim, particularly as to the partnership returns, was the testimony of the Government's own witnesses that although they would "not advocate the method of bookkeeping" installed and supervised by petitioner, yet there was nothing "false or fictitious" about it, and that the partnership books "accurately reflected the gross disbursements and gross receipts" (R. p. 37 and p. 30). The testimony also showed that petitioner had never got past the sixth grade in grammar school.

Defendant's trial attorney* failed to file a motion for acquittal at the close of all the evidence. Nor did he raise any objection, as required by Rule 30 of the Federal Rules of Criminal Procedure, to the following instruction on **presumption** which was given to the jury:

> "The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of

---

* It may be of some significance, especially in view of the lower Court's reference to entrapment in its discussion of Rule 30, that besides failing to object to the instruction and to file the motion for acquittal, this same trial attorney failed even to file his notice of appeal within proper time, due to a misunderstanding on his part. The lower Court's refusal to hear the appeal on that ground was reversed by this Court on Certiorari. *Rosenbloom v. U. S.* (Nov. 25, 1957), 78 S. Court 202.

taxes, that he intended to defeat the tax on the unreported income."

On appeal petitioner contended that the evidence was insufficient to sustain the verdict, and that the aforesaid instruction was so prejudicially erroneous and would so manifestly result in a miscarriage of justice as to warrant review under Rule 52 (b) of the Federal Rules of Criminal Procedure. The Court of Appeals affirmed the judgment of the District Court, in an opinion ruling (1) that the failure to file a motion for acquittal at the close of all the evidence prevented the appellate Court from reviewing the question of the sufficiency of the evidence, (2) that the quoted instruction on presumption was not prejudicially erroneous, and (3) that even if it were, the failure to object to it, as required by Rule 30 of the Federal Rules of Criminal Procedure, prevented its review on appeal, because the error would not result in such a miscarriage of justice as to warrant application of Rule 52 (b) of those rules.

## REASONS FOR GRANTING THE WRIT.

The ruling of the Court below that petitioners' failure to file a motion for acquittal barred the Appellate Court from reviewing the question of the sufficiency of the evidence is in sharp conflict with the recent decision of **U. S. v. Safur**, 251 F. 2d 30, decided January 10, 1958, by the Seventh Circuit Court of Appeals. The ruling of the Court below that the instruction on presumption was not prejudicially erroneous, is in conflict with the view expressed by the U. S. Supreme Court in **Morissette v. U. S.** (1952), 342 U. S. 246, 275, 72 S. Court 240, 243, 96 L. Ed. 288, and with recent decisions of the Court of Appeals of the Ninth Circuit. The Court's further ruling that in any event the instruction was not so prejudicial as to warrant its review

under Rule 52 (b) of the Federal Rules of Criminal Procedure, because timely objection was not made thereto, is likewise in conflict with decisions of the Court of Appeals of the ninth and other circuits, and, unless reversed, will result in a serious miscarriage of justice. These three rulings will be discussed in that order below.

1. **The Ruling That the Question of the Sufficiency of the Evidence Could Not Be Reviewed Because of Failure to File a Motion for Acquittal at the Close of All the Testimony.**

In its opinion the Court below ruled that—

> "The question of the sufficiency of the evidence to sustain the verdict is not before us, because that question was not made a question of law by presenting to the trial Court a motion for acquittal at the close of all the evidence."

The Court then cited several of its own prior decisions and quoted the following passage from the latest of these, **Picciurro v. U. S.** (8 Cir. 1953), 250 F. 2d 585:

> "In order to entitle defendant to question the sufficiency of the evidence he must first have presented the question to the trial Court by motion for judgment of acquittal interposed at the close of all the testimony, thus raising a question of law which the Court will consider on appeal, and it is well settled that absent such motion this Court will not review the evidence."

Squarely in conflict with these decisions of the Court below is the view of the Court of Appeals of the Seventh Circuit, as is obvious from the following passage of the opinion of that Court in the recent case of **U. S. v. Safur** (7 Cir. 1958), 251 F. 2d 30:

"The sole contention here is that the proof was insufficient to support the verdict on counts 5 and 6. We are met at once, however, with the fact that the issue was not raised in the Court below by motion for acquittal or otherwise, which presents the question as to whether it should be considered on review. This depends upon whether such insufficiency amounts to plain error within the meaning of Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. Relative thereto, we can do no better than quote from the recent opinion of this Court in United States v. Vasen, 222 F. 2d 3, 6, as follows:

> 'And when issues have, on the whole, been left to the jury in substantial compliance with the applicable law, we will not notice an error which the trial judge has not been asked to correct unless substantial rights have been adversely affected; that is to say, only seriously prejudicial error will be noticed in the absence of objection (citing cases). The error must be such as would result in manifest miscarriage of justice or affect seriously the fairness of judicial proceedings (citing cases).'

"**Obviously, a conviction upon insufficient proof, even in the absence of a motion for acquittal, would amount to a manifest miscarriage of justice.** The government appears to so recognize because it states in its brief that a reading of the record 'will quickly convince this Court that there was substantial evidence to support the verdict of the jury.' We have read the entire record of the proceedings in the trial Court and, unfortunately for the government, we are left in grave doubt as to the sufficiency of the proof.

"It is fair and perhaps due to the trial judge to state that the trial record reveals no prejudicial error.

This is evidenced by the fact that no error is asserted other than the insufficiency of the proof. How the trial judge would have ruled on that issue if it had been properly presented and argued we need not speculate. We are convinced that under the circumstances of the case **we cannot escape the responsibility of reviewing and deciding the issue presented.**" (Emphasis added.)

## 2. The Ruling That the Instruction on Presumption Was Not Prejudicially Erroneous.

In 1955 an instruction identical to the one here involved and given by the trial Court in a tax evasion case without timely objection thereto, was reviewed in **Bloch v. U. S.** (9 Cir. 1955), 221 F. 2d 788, 789. Taking note of the admonition by the Supreme Court in the **Morissette** case, decided three years earlier, that such a presumption **"would conflict with the over-riding presumption of innocence with which the law endows the accused and which extends to every element of the crime"**, the Court in the **Bloch** case expressed itself as follows:

> "Proceeding then to a consideration of the Court's charge we find the trial court instructed the jury in part as follows:
>
> > 'The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant.'
>
> "That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. U. S., 5 Cir., 203

F. 2d 884. However, the trial Court went on in his instruction, and in the very next sentence said:

> 'The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.'

"**This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element.** Morissette v. U. S., 342 U. S. 246, 273, 72 S. Ct. 240, 96 L. Ed. 288; Wardlaw v. U. S., supra.

"The conclusion sought to be supplied by presumption in the Morissette case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return." (Emphasis added.)

Although the **Bloch** case and the foregoing passage therefrom were cited in this petitioner's briefs to the Court below, the Court makes no mention of the case in its opinion. Instead it cites four cases which its says "hold that it is not improper to instruct that one is presumed to intend the natural consequences of his acts where the issue of intent is clearly presented to the jury in the charge as a whole:" Agnew v. United States (1897), 165 U. S. 36; Grayson v. United States (8 Cir. 1939), 107 F. 2d 367; Bateman v. United States (9 Cir. 1954), 212 F. 2d 61; Legatos v. United States (9 Cir. 1955), 222 F. 2d 678.

In citing these four cases, the Court apparently focused its attention only on the relatively innocuous first clause of the instruction complained of, i. e., "the presumption is that a person intends the natural consequences of his act." The passages it quotes from the first three of these cases show on their face that the Courts there were dealing only with the propriety of instructing the jury that it may presume a person intends the "natural" or "legitimate" consequences of his act. In none of these three cases was an instruction given or reviewed that would, as here, allow the jury to presume that the defendant intended to **cheat** or **defraud** the government of his unreported income, i. e., to presume the specific statutory intent required to establish the particular offense of tax evasion. And even in the fourth case, the **Legatos** case, the instruction was a far cry from the one here involved, for the presumption there was premised upon a finding of "evil motive or bad purpose," the entire instruction reading as follows:

> "The presumption is that a person intends the natural consequences of his acts, and with respect to defendant, Legatos, the natural presumption would be that if a person consciously, knowingly and intentionally, **with evil motive or bad purpose** did not set up his full income and thereby the government was cheated or defrauded of taxes, he intended to defeat the tax." (Emphasis added.)

As was said by the eighth circuit Court itself in an earlier case, **Imholte v. United States** (8 Cir. 1955), 226 F. 2d 585, l. c. 590, commenting on the **Legatos** decision:

> "In the Legatos case, the Court recognized the vice of such an instruction but found it was so qualified as to be not prejudicial."

So far therefore as these four cases cited in the opinion of the Court below are concerned, they establish nothing more than the propriety of the first clause of the instruction complained of here—a clause with which this petitioner has no serious quarrel. The real trouble lies in the words that follow that clause. As to them, the decision in the **Bloch** case, based upon the view laid down in the **Morissette** case, still stands unimpeached in its holding that such words constitute prejudicial error. The most recent case in point decided by the same ninth circuit Court of Appeals, **Herzog v. United States** (9 Cir. 1956), 235 F. 2d 664, inferentially confirms that holding by distinguishing the instruction there given from the one condemned in the **Bloch** case.

The opinion of the Court below, as to the error inherent in the instruction itself, is, therefore, clearly in conflict with the decisions of a sister Court of Appeals as well as with a decision of the Supreme Court.

### 3. The Ruling That the Instruction Was Not So Prejudicial as to Warrant Review Under Rule 52 (b) of the Federal Rules of Criminal Procedure, Because Timely Objection Was Not Made Thereto.

The Court below not only refused to hold that the instruction complained of was erroneous, thereby creating, as has been shown, a conflict with the decision in the **Morissette** case and cases decided by the ninth circuit Court of Appeals. It also held that the failure to object to the instruction, as required by Rule 30 of the Federal Rule of Criminal Procedure, was a fatal obstacle to its review on appeal, and that the case did not present a situation warranting a review under Rule 52 (b) because "the instructions considered as a whole were not prejudicial" and, therefore, there was "no miscarriage of

justice." In this respect also the opinion is in conflict with the **Bloch** case, for there the Court took note of the error in the instruction, even though it had not been objected to at the trial or even assigned as error on appeal, the Court there taking the view that Rule 52 (b) required it to do so in order to avoid manifest injustice. The same view has been taken in a number of other cases, among them the following: United States v. Ward (3 Cir. 1948), 168 F. 2d 226, 228; United States v. Raub (7 Cir. 1949), 177 F. 2d 312, 315; Stewart v. United States (D. C. Cir. 1954), 214 F. 2d 879, 882; Taylor v. United States (D. C. Cir. 1954), 222 F. 2d 398, 404; United States v. Cumberland (3 Cir. 1952), 200 F. 2d 609, 611.

But apart from this conflict with other appellate decisions, the reasoning of the Court below deserves careful attention, for its conclusion was apparently based upon a failure to grasp the all-important distinction that exists between an instruction explaining the proof necessary to establish the required element of "intent" or "willfulness" and an instruction authorizing the jury to indulge in a **presumption** of specific intent, i. e., "the evil motive or bad purpose" of cheating or defrauding the government. This failure explains the statements of the Court below that whatever error there may have been in the particular words complained of, it was cured by other passages in the Court's charge to the jury and, therefore, "the instructions contained as a whole" were not so prejudicial as to result in a miscarriage of justice.

The other passages referred to are a sentence immediately preceding the words complained of, and a sentence that was used much later in the Court's charge to the jury. The first reads as follows:

> "The attempt to evade and defeat the tax must be a willful attempt, that is to say, intentionally done,

with the intent that the government should be defrauded of the income tax due from the defendant, by keeping from the government a tax imposed by the income tax laws, which it was the duty of the defendant to pay to the government."* The second reads thus:

"So, when intent is sought to be shown by the actions of the person in question, and the surrounding circumstances, there must be proof of facts by or from which the specific intent can be inferred and determined with certainty—that is, such proof of intent must establish this element of the charge beyond a reasonable doubt."

It is submitted that neither of these two sentences has any relation to the instruction given in the sentence under discussion. Both deal with the element of **intent** or **wilfullness.** Neither has any bearing on the question of **presumption.** Both tell the jury that it must find that the accused **intended** to cheat or defraud the government of taxes. But the sentence under discussion goes much further. It tells the jury that it may make this finding by indulging in a presumption that he had this evil intent from the fact that "he did not report all his income and thereby the government was cheated or defrauded of taxes."

In the circumstances of this case such an instruction was manifestly unfair. For the only issue at the trial was whether the defendant acted dishonestly and with an evil purpose of cheating the government of taxes, or acted in good faith and with an honest though mistaken belief as to the law. The defendant did not deny that he underreported the net income of the partnership business and

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* It will be recalled that in the *Bloch* case, supra, a similar sentence preceded the condemned instructions. See page 9, above.

correspondingly that of his brother and himself. He denied, however, that he did this **with the evil motive** of cheating and defrauding the government. To instruct the jury that such a motive could be **presumed** was therefore the kind of "plain error * * * affecting substantial rights" that Rule 52 (b) was intended to correct in order to preserve "the fairness of judicial proceedings" and thereby avoid "manifest injustice" (**U. S. v. Vasen** (7 Cir. 1958), 222 F. 2d 3, 6).

In support of the foregoing distinction between an instruction on **intent** and an instruction on **presumption** and its significance on the question of the applicability of Rule 52 (b), perhaps no better case can be cited than one that seems to be the latest reported case on the subject—**Herzog v. United States**, supra. Although the court in that case refused to invoke Rule 52 (b), we cite it because it so clearly points up the distinction between an instruction on **intent** and one on **presumption** in relation to the issues of a case.

In the **Herzog** case the defendant was convicted of attempted income tax evasion. The trial Court had given an instruction defining the term "willfully" as used in the statute. Defendant did not object to it. In its opinion the Court of Appeals first carefully pointed out that the questioned instruction had to do solely with the definition of the term "willfully," and that no instruction "comparable" to the instruction on presumption in the **Bloch** case, supra, was given in this case. The Court even went to the trouble of quoting the latter verbatim. (It will be recalled that it was identical with the one in our case.)

The Court then proceeded to consider the alleged error in the instruction that was given, i. e., on "willfully," in the light of the evidence and the issues in the case. We quote the following highly pertinent passage from its opinion, l. c. 667-668:

"We turn briefly to the pertinent evidence in the case. Appellant operated a Pontiac agency, dealing in both new and used cars. His principal business was the sale of used cars at wholesale to used car dealers. During the period in question used cars were in great demand and hard to come by. In making these sales, according to witnesses for the government, appellant exacted 'side' payments in cash from the dealers in addition to the price appearing on the invoices or sales orders. These cash 'side' payments were not reflected on appellant's books, and concededly the amounts thereof were not reported in his income tax returns. In appellant's original brief on the appeal this asserted practice in the wholesaling of used cars was characterized as 'the principal contention of the prosecution.' **Appellant's answer to the government's evidence on this vital phase was a flat and unequivocal denial. There was no claim on his part of inadvertence, mistake or the like. The issue was squarely one of credibility—whether the accused did or did not receive 'side' money through his sales to used car dealers. Thus in respect of this major issue the instruction on willfulness was at worst purely innocuous.**" (Emphasis added.)

The issue in our case was not one of "credibility." The petitioner here claimed, and the issue here was one of, mistake, a mistake made honestly and in good faith. Consequently the question of an honest as against an evil or fraudulent motive becomes all important, indeed, crucial, in this case. In turn, the question as to whether the jury may or may not **presume** such motive from the mere act of knowingly under-reporting income, becomes equally crucial in its possible effect on the verdict of the jury. Since it must be conceded, in the light of the decisions cited herein, that to charge the jury that it may indulge in such a presumption is error, and since it has been demon-

strated that the error here goes to the heart of the defense in the case, the petitioner feels justified in urging this Court to grant this petition and thereby avoid what will otherwise result in "manifest injustice" involving the serious punishment of penitentiary confinement.

Respectfully submitted,

SOLOMON P. ROSENBLOOM,
Also Known as SOL ROSENBLOOM.

ISRAEL TREIMAN,
Of Counsel,
1955 Railway Exchange Building,
St. Louis 2, Missouri.

**Affidavit.**

(Pursuant to Rule 33.3 (c) of Revised Rules of Supreme Court of the United States.)

City of St. Louis, } ss.
State of Missouri. }

I, Israel Treiman, being of lawful age and having been duly sworn, upon my oath do state that I have served a copy of this petition for certiorari upon Wayne H. Bigler, Jr., Assistant United States Attorney, who represented respondent in the Court below, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him at the United States Courthouse, St. Louis, Missouri, on this the ..... day of November, 1958, and that I have also served a copy of this petition upon the Solicitor General of the United States by depositing the same in a United States mail box, with air mail postage, prepaid, addressed to Solicitor General, Department

of Justice, Washington 25, D. C., on this ..... day of November, 1958.

.....

Subscribed and sworn to before me, a notary public in and for the said city and state, this ..... day of November, 1958.

.....

My commission expires:

## APPENDIX.

### Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,842.

Solomon P. Rosenbloom, Also Known as Sol Rosenbloom, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 15, 1958.]

Israel Treiman (Shifrin, Treiman, Agatstein & Schermer were on the brief with him) for Appellant.

W. Francis Murrell, Assistant United States Attorney, (Harry Richards, United States Attorney, Wayne H. Bigler, Jr., and John A. Newton, Assistant United States Attorneys, were on the brief) for Appellee.

Before GARDNER, Chief Judge, and VOGEL and MATTHES, Circuit Judges.

GARDNER, Chief Judge.

Appellant was indicted, tried and convicted on an indictment charging him with violation of the Internal Revenue

Act. The indictment under which he was convicted contained six counts. In Counts I and II the indictment charged appellant with filing fraudulent joint income tax returns for himself and his wife for the calendar years 1950 and 1951. Counts III and IV charged appellant with filing false partnership returns for the Rosenbloom Monument Company for the same two years and Counts V and VI charged him with filing false joint returns for his brother and wife for the same two years. We shall hereinafter refer to appellant as defendant.

Defendant, his brother, his two sons and his brother's son constituted a family partnership and at the times here involved were engaged in the sale of headstones and markers for burial plots and were operating under the trade name of Rosenbloom Monument Company. Defendant and his brother had been operating the business for some thirty-five years and in the years in question were assisted by defendant's two sons and his brother's one son. The five were treated as equal partners on the partnership income tax returns. Defendant ran the office, supervised the bookkeeping and made out the partnership and personal income tax returns for the years 1950 and 1951. He had taken a nine months business college course which included elementary bookkeeping. The chief source of income of the members of this family partnership and their wives was from the Rosenbloom Monument Company.

The books of the company, kept under the supervision and direction of defendant, indicated that for the years involved the partnership realized no net income. However, the income tax returns for those years as prepared by the defendant showed a taxable net income of $25,534.83 in 1950 and $26,750.21 in 1951. The evidence of the government showed that the taxable income for these years was $49,294.88 in 1950 and $53,082.00 in 1951. There is no material conflict in the evidence as to these primary facts.

The discrepancy between the amounts shown as taxable income and the actual taxable income is largely accounted for by the fact that defendant siphoned off the income of the company by paying the sum of $51,665.00 in 1950 to the five partners and charging it to "selling expense", and in 1951 paying the sum of $53,000.00 to the partners and likewise charging it to "selling expense". Defendant admitted that in preparing the partnership tax returns he padded and enlarged legitimate items of company expense to the extent of almost $25,000.00 in each of the two years involved. The evidence will be further developed during the course of this opinion.

At the close of the government's evidence in chief defendant moved for judgment of acquittal, which motion was denied. He then introduced evidence on his own behalf, following which the Court submitted the case to the jury on instructions to which defendant made no objections and saved no exceptions. The jury found the defendant guilty on all counts of the indictment and the Court, pursuant to the verdict of guilty, sentenced defendant to imprisonment for eighteen months on each count contained in the indictment, sentences to run concurrently, and imposed a fine of $2,500.00. He seeks reversal on substantially the following grounds: (1) the government's own testimony refuted the charge that the partnership returns were false and fraudulent. (2) there was not sufficient evidence of specific intent nvolving bad purpose and evil motive to sustain the verdict of the jury as to any of the counts and therefore the District Court erred in not sustaining the motion for new trial and for judgment of acquittal notwithstanding the verdict, and (3) the District Court committed prejudicial error in its instruction to the jury on presumption of specific intent.

It is contended by defendant that the evidence was insufficient to sustain the verdict of guilty, particularly as

to the charges contained in Counts III and IV, and hence he urges that the Court erred in overruling his motion for acquittal interposed at the close of the government's case and in overruling his motion for judgment of acquittal notwithstanding the verdict. It is observed, however, that no motion for acquittal was interposed by defendant at the close of all the evidence. It is also to be noted that he introduced evidence in his own defense. The question of the sufficiency of the evidence to sustain the verdict is not before us because that question was not made a question of law by presenting to the trial court a motion for acquittal at the close of all the evidence. *Picciurro* v. *United States*, 8 Cir., 250 F.2d 585. In *Picciurro* v. *United States*, supra, we said:

> "In order to entitle defendant to question the sufficiency of the evidence he must first have presented the question to the trial court by motion for judgment of acquittal interposed at the close of all the testimony, thus raising a question of law which this court will consider on appeal, and it is well settled that absent such motion this court will not review the evidence."

See also, Seventh Amendment, U. S. Constitution; *McDonough* v. *United States*, 8 Cir., 248 F.2d 725; *Kreinbring* v. *United States*, 8 Cir., 216 F.2d 671; *Mitchell* v. *United States*, 8 Cir., 208 F.2d 854; *Leeby* v. *United States*, 8 Cir., 192 F.2d 331; *Meier & Pohlmann Furniture Co.* v. *Troeger*, 8 Cir., 195 F.2d 193.

It is next contended that there was not sufficient evidence of specific intent to sustain the verdict. As above noted the question of the sufficiency of the evidence has not been preserved and is not before us.

It is urged that the Court erred in its instruction to the jury on the question of specific intent. It is conceded that defendant interposed no objection to the instruction now

complained of before the jury retired, as required by Rule 30, Federal Rules of Criminal Procedure. This precludes consideration of this contention on appeal. *Kreinbring* v. *United States*, supra; *Nicholson* v. *United States*, 8 Cir., 221 F.2d 281; *Gicinto* v. *United States*, 8 Cir., 212 F.2d 8; *Davis* v. *United States*, 8 Cir., 229 F.2d 181; *Schuermann* v. *United States*, 8 Cir., 174 F.2d 397. Rule 30, Federal Rules of Criminal Procedure, provides that:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The rule if complied with gives the trial court an opportunity to correct by modification or otherwise the instruction objected to and thus cure the error, if any. In *Kreinbring* v. *United States*, supra, where this question was in issue, we said:

> "In the absence of a request for or exceptions to instructions there is nothing to review."

In *Nicholson* v. *United States*, supra, it is said:

> "There was no exception to this part of the charge, which precludes consideration of the complaint on appeal."

If this were not the rule counsel for defendant, by failing to object to an erroneous instruction, might entrap the Court by thus, in effect, laying foundation for reversal in the event of conviction. The rule is certainly a very salutary one. The part of the instruction now complained of reads as follows:

> "The attempt to evade and defeat the tax must be a willful attempt, that is to say, intentionally done, with the intent that the government should be de-

> frauded of the income tax due from the defendant, by keeping from the government a tax imposed by the income tax laws, which it was the duty of the defendant to pay to the government. The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income."

The objection now urged is that specific intent may not be presumed but must be proven, and we are asked to consider the alleged error under Rule 52 (b), Federal Rules of Criminal Procedure, which provides that:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The instructions must be considered as a whole. Here the Court specifically instructed as to the necessity for proof of specific intent and the Court in great detail instructed as to the necessity of the jury's finding intent to evade the particular taxes involved beyond a reasonable doubt before it could convict. Thus the Court instructed that:

> "So, when intent is sought to be shown by the actions of the person in question, and the surrounding circumstances, there must be proof of facts by or from which the specific intent can be inferred and determined with certainty—that is, such proof of intent must establish this element of the charge beyond a reasonable doubt."

We need not approve of the exact wording of the instruction here now objected to. Certainly many cases hold that it is not improper to instruct that one is presumed to intend the natural consequences of his acts where the

issue of intent is clearly presented to the jury in the charge as a whole. *Agnew* v. *United States*, 165 U.S. 36; *Grayson* v. *United States*, 8 Cir., 107 F.2d 367; *Bateman* v. *United States*, 9 Cir., 212 F.2d 61; *Legatos* v. *United States*, 9 Cir., 222 F.2d 678. In *Agnew* v. *United States*, supra, it was urged that the Court erred in giving the following instruction:

> "The law presumes that every man intends the legitimate consequence of his own acts."

In disposing of this contention the court said:

> "In our opinion there was evidence tending to establish a state of case justifying the giving of this instruction, which was unexceptionable as matter of law."

In the instant case, while the question of the sufficiency of the evidence to sustain the verdict is not properly presented, we have examined the record with great care and think there is abundant evidence warranting the jury in finding specific intent to defeat the tax on the unreported income. In *Grayson* v. *United States*, supra, the trial court had instructed the jury that defendant was presumed to intend the natural consequences of her acts. It was urged that this invaded the province of the jury in that it raised a conclusive presumption of intent. Answering this contention this court said:

> "There is, of course, no presumption of law to that effect. (Citing cases.) The use of the words 'presume' or 'presumption' in this connection is not to be approved. No doubt inferences as to intent may be gathered from subsequent acts and conduct, but no presumption of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted

to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case."

*Bateman* v. *United States*, supra, was a tax evasion case in which the trial court had among other things said in its instructions:

> "'the law presumes that every man intends the natural and probable consequences of his own voluntary acts,'"

This was urged as error. In response to this contention the Court said:

> "Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., failure to except to an instruction on the ground urged on appeal forecloses review of the question. *Berenbeim* v. *United States*, 10 Cir., 1947, 164 F.2d 679.
>
> "Although we would be justified in placing our determination of this question on the failure of appellants to comply with Rule 30, we deem it advisable to point out that the trial court correctly instructed on the element of intent.
>
> "As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

In the instant case we rest our decision upon the ground that defendant failed to object to the instructions as given by the lower court, but we think that the instructions taken as a whole clearly required the jury to find specific intent to defeat the tax on the unreported income. We do not think this case presents a situation warranting us to

review the alleged error under Rule 52 (b), Federal Rules of Criminal Procedure as we are of the view that the instructions considered as a whole were not prejudicial and that there has been no miscarriage of justice in this case.

We have considered all other contentions urged by the defendant but think them without merit. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

**(Judgment.)**

United States Court of Appeals
for the Eighth Circuit.

No. 15842 - - - September Term, 1958.

Wednesday, October 15, 1958.

Solomon P. Rosenbloom, also known as Sol Rosenbloom,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence

of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

October 15, 1958.

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FILED
DEC 16 19[illegible]
JAMES R. BROWNING, Clerk

No. 507

# In the Supreme Court of the United States

OCTOBER TERM, 1958

SOLOMON P. ROSENBLOOM, ALSO KNOWN AS SOL ROSENBLOOM, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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49-963 – 58

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–27) is reported at 259 F. 2d 500.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1958 (Pet. 27–28), and the petition for a writ of certiorari was filed on November 10, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

### QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court committed plain error in instructing the jury on the element of willfulness.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b)).

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge

or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793 (b) (1)).

## STATEMENT

On November 14, 1956, petitioner was charged, in a six-count indictment filed in the United States District Court for the Eastern District of Missouri, with willfully attempting to evade a substantial part of his individual income taxes for 1950 and 1951, in violation of Section 145 (b) of the Internal Revenue Code of 1939, and with willfully preparing and filing false and fraudulent partnership returns for the Rosenbloom Monument Company and false and fraudulent individual income tax returns for Louis J. and Bessie Rosenbloom for the same years, in violation of Section 3793 (b) (1) of the Code. (R. 1–4.) The indictment alleged that the reported income compared with the true income as follows (R. 1–4):

| | Net income reported | Net income corrected |
|---|---|---|
| Solomon Rosenbloom (Petr.): | | |
| 1950 | $6,114.68 | $10,544.30 |
| 1951 | 6,331.82 | 11,301.72 |
| Rosenbloom Monument Company: | | |
| 1950 | 25,543.83 | 49,294.88 |
| 1951 | 26,750.21 | 53,082.00 |
| Louis and Bessie Rosenbloom | | |
| 1950 | 5,885.79 | 10,289.98 |
| 1951 | 7,174.39 | 12,212.66 |

After a jury trial, petitioner was found guilty on all counts. (R. 69.) On June 14, 1957, petitioner was given concurrent prison sentences of eighteen months on each of the six counts and fined $1,250 on each of the first two counts, a total fine of $2,500. (R. 72–74.)

The evidence to support the verdict may be summarized as follows:

During the prosecution years petitioner and four persons related to him were partners in a firm known as the Rosenbloom Monument Company, which engaged in the business of selling stone monuments for erection in cemeteries. (R. 17, 79, 85.) The books of the partnership were kept by petitioner's brother-in-law under the direct supervision of petitioner. (R. 17, 18.) This bookkeeper had been trained in his duties by petitioner, who had taken a nine months course at a business college, and who had been in the monument business for thirty-five years. (R. 17, 39, 44.) At the end of each year, petitioner would prepare a profit and loss statement, the individual income tax returns and the partnership returns of income. (R. 18, 19, 39, 79, 85.)

The investigation began late in 1952, when petitioner was first interviewed by an internal revenue agent. (R. 25, 31.) Examination of the partnership books disclosed substantial discrepancies between them and the partnership returns. The most striking difference appeared in "Selling Expenses", to which approximately $51,000 of drawings of the partners had been charged in each of the two years. This account was shown on the books as totaling $53,487.03

in 1950 and $54,867.37 in 1951, although only $1,952.73 and $3,037.81 were claimed on the respective partnership returns. (R. 20, 21–24, 31–32, 34.)[1] On the other hand, the amount charged to "Purchases" on the returns was overstated by $21,000 in 1950 and $22,000 in 1951, and the amount charged to "Payroll to Employees" on the returns was overstated by $2,712.60 in 1950 and $3,029.06 in 1951. (R. 19, 26, 27, 38, 77, 83.) When the Treasury agents asked petitioner for the work papers he had used in the preparation of the returns, petitioner stated that he had either destroyed or mislaid them (though he produced what purported to be those same work papers at the trial). (R. 32, 39, 44.). When the agents asked whether petitioner could reconcile the returns with the books, he said he could not. (R. 32.) Petitioner advised them that, whenever the partnership bank account would become "swollen", $10,000 would be withdrawn and divided among the partners. (R. 28–29.) When the agents inquired as to the reason for the discrepancies between the books and returns on the item of "Purchases", petitioner gave the false explanation that a substantial part of the difference represented cash purchases of stone which he had made from "wildcat" dealers whose names he did not know. He gave this explanation in November, 1952, and again in January, 1953. (R. 27–28, 35.) In February,

[1] The bookkeeper charged the partners' withdrawal to "Selling Expenses" under instructions from petitioner. (R. 24.) Whenever the bookkeeper had doubts as to how to charge a cash disbursement item in the books he would consult with petitioner. (R. 19.)

1953, however, petitioner retracted this story and stated that it was not true. (R. 28, 35.)

Petitioner, testifying in his own behalf at the trial, admitted that he "did originally give [the agents] this story about the wildcat purchases and then found that it wasn't right." (R. 45.) He testified that he had tendered a check for $40,000 to the Government in 1955 in payment of back income taxes for himself and his partners for the years 1947 through 1951 (R. 42, 45); that he had never intended to defraud the Government of any taxes (R. 43); that he had been under the impression that the partners were entitled to withdraw "fees" from the business without paying income tax on them (R. 46, 47); and that the overstatement of the "Purchases" account on the returns embodied these "fees" (R. 46).

**ARGUMENT**

1. Although petitioner frames his first question (Pet. 7–9) in terms of whether the court below erred in refusing to review the sufficiency of the evidence in the absence of a motion for acquittal at the close of all the evidence, it is clear that this case presents no such question. There was undoubtedly a substantial understatement of net income on each of the returns, and petitioner concedes (Pet. 5) that the only issue the jury was called upon to decide was that of willfulness. With respect to that element of the proof, the Court of Appeals stated (Pet. 25):

> In the instant case, while the question of the sufficiency of the evidence to sustain the verdict is not properly presented, we have examined

> the record with great care and think there is abundant evidence warranting the jury in finding specific intent to defeat the tax on the unreported income.

It is clear that the court was correct. The jury could readily have inferred willfulness from the size and consistency of the understatements of income, resulting from the systematic falsification of the books and tax returns by petitioner, and from his initial explanation to the investigating agents, later admitted to have been false, that the excessive deductions for "Purchases" represented transactions with "wildcat" dealers. (*Supra*, pp. 5–6.) Moreover, the defense advanced by petitioner at the trial was plainly incredible. If he had acted in the honest though mistaken belief that the partners were entitled to draw "fees" without paying income tax on them, he would hardly have disguised over $20,000 per year of such withdrawals on the returns as "Purchases". (*Supra*, pp. 5, 6.) We submit that the evidence of guilt was indeed "abundant", as the court below found, and that there is no conflict with *United States* v. *Safur*, 251 F. 2d 30 (C. A. 7th), which merely holds that there may be circumstances under which insufficiency of proof may amount to plain error under Rule 52 (b) of the Federal Rules of Criminal Procedure, and hence be reviewable even in the absence of a timely motion for acquittal.

2. Petitioner contends (Pet. 9–17) that the trial court committed reversible error in instructing the jury on the issue of willfulness. The argument is

without substance. The portion of the instruction complained of is as follows (R. 56):

> The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income.

In the first place, the point has not been preserved. No objection was made at the trial, as required by Rule 30 of the Federal Rules of Criminal Procedure,[2] nor was the point raised in petitioner's motion for a new trial. (R. 69–70.) Not having called the alleged error to the attention of the trial court, petitioner is in no position to complain on appeal. *Johnson* v. *United States*, 318 U. S. 189, 200–201; *Wong Tai* v. *United States*, 273 U. S. 77, 83; *Boyd* v. *United States*, 271 U. S. 104, 107–108. Second, petitioner is taking a single sentence from the context of a long instruction; but the sentence must be read in the light of the charge as a whole. *Herzog* v. *United States*, 235 F. 2d 664, 667 (C. A. 9th), certiorari denied, 352 U. S. 844. So read, it is seen to be innocuous; the jury could not

[2] "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

have been misled into believing that a presumption could take the place of solid proof of willfulness.[3]

There is no conflict between the instant case and those relied upon by petitioner (Pet. 6, 9–10, 12, 13): *Morissette* v. *United States*, 342 U. S. 246; and *Bloch* v. *United States*, 221 F. 2d 786 (C. A. 9th), rehearing denied, 223 F. 2d 297. In *Morissette*, the trial judge removed from the jury's consideration the issue of felonious intent, refusing to permit defense counsel to argue that the defendant had acted with innocent

---

[3] The trial court charged the jury, *inter alia*, as follows:

> "Fraud," within the meaning of the indictment here returned, means actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing, and mere negligence or carelessness, whether slight or great, is not equivalent or sufficient. Fraud is never imputed or presumed and you may not find the defendant guilty upon circumstances, if any, which create only suspicion. [R. 55.]
>
> * * * * *
>
> You are instructed that the mere filing of a false or fraudulent income tax return, or the willful failure to pay an income tax due, are not of themselves sufficient to constitute an offense under this indictment; that * * * it is incumbent upon the government [to] * * * prove beyond a reasonable doubt that the defendant committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the tax is levied * * *. [R. 58.]
>
> * * * * *
>
> So, when intent is sought to be shown by the actions of the person in question, and the surrounding circumstances, there must be proof of facts by or from which the specific intent can be inferred and determined with certainty—that is, such proof of intent must establish this element of the charge beyond a reasonable doubt. [R. 61.]

intent, and deciding the question of intent "as a presumption of law, apparently conclusive." (342 U. S. at 249, 273–274.) In the *Bloch* case, the Ninth Circuit reversed a conviction partly because of an instruction similar to that complained of here, but also because of (1) other instructions on willfulness held to have been erroneous; and (2) misconduct of the prosecutor. The *Bloch* case, insofar as it might have been deemed comparable to the situation presented in the case at bar, must be considered in light of the later decision of *Herzog* v. *United States, supra,* decided by nine judges of the Ninth Circuit sitting *en banc.* After fully discussing the *Bloch* case, in which there was no discussion of the effect of the court's instructions as a whole, the court stated (235 F. 2d 667):

> In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record. * * *

The court below, consistent with the *Herzog* case, followed the Ninth Circuit rule and held, correctly we submit, that "the instructions taken as a whole clearly required the jury to find specific intent to defeat the tax on the unreported income." (Pet. 26.)

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1958.

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